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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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EXAMINER

WELLS, LAUREN Q

ART UNIT PAPER NUMBER

1617

DATE MAILED: 03/04/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

# Office Action Summary

Application No.

09/838,649

Applicant(s)

CIOCA ET AL.

Examiner

Lauren Q Wells

Art Unit

1617

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☒ Responsive to communication(s) filed on 06 May 2002.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 1-22 is/are pending in the application.
- 4a) Of the above claim(s) 6-8,13-18 and 21 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-5,9-12,19,20 and 22 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on \_\_\_\_\_ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

## Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

## Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892) 4) ☐ Interview Summary (PTO-413) Paper No(s). \_\_\_\_\_
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948) 5) ☐ Notice of Informal Patent Application (PTO-152)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s) 2. 6) ☐ Other: \_\_\_\_\_

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### **DETAILED ACTION**

Claims 1-22 are pending. Claims 6-8, 13-18 and 21 are withdrawn from consideration, as they are directed toward non-elected subject matter.

#### ***Election/Restrictions***

Applicant's election with traverse of the Restriction Requirement in Paper No. 3 is acknowledged. The traversal is on the ground(s) that both groups relate to one singular invention, namely, the antimicrobial incorporated in the cluster structures of structured water.

Applicant argues, "There is no logical reason to discern how a structured water comprising antioxidant active agents can result from the claimed process which is devoid of any antioxidant. Rather, since a distinct process is used to incorporate the antimicrobial into the cluster structures of structured water, this lends support to the theory that the same process will not make another materially different product". This argument is not persuasive. Even if, as Applicant alleges, that the instant product cannot be an antioxidant, the Examiner respectfully points out that the product can be made by simply adding silver to structured water, as the electrostatic charges on the silver and water would result in electrostatic interactions between negative charges within the cluster and positive charges of the silver, thus resulting in a cluster comprising silver ions within it. For this reason alone, the inventions of Group I and Group II are distinct.

The requirement is still deemed proper and is therefore made FINAL.

Note: While claim 13 was grouped into Group I in the Restriction of Paper No. 3, it is respectfully pointed out that claim 13, depends on claim 6, which is a part of Group II. Thus, claim 13 was incorrectly incorporated into Group I. Thus, claim 13 is a part of Group II.

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***Claim Rejections - 35 USC § 112***

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 1-5, 9-12, 19-20 and 22 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

(i) Claim 1 is vague and indefinite, as it is confusing. Does not structured water inherently comprise a cluster structure?

(ii) Claims 2 and 4-5 recite the limitation "The composition of claim 1" in line 1. There is insufficient antecedent basis for this limitation in the claim. Furthermore, claims 2-5 are vague and indefinite, as it is not clear whether Applicant is claiming a composition comprising structured water, or if Applicant is claiming structured water.

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-3, 4-5, 9-12, 19-20, and 22 are rejected under 35 U.S.C. 103(a) as being unpatentable over Cioca et al. (6,139,855) in view of Beerse et al. (6,217,887).

The instant invention is directed to structured water comprising a cluster structure, wherein at least two antimicrobial agents are within the cluster structure, and compositions and methods thereof.

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Cioca et al. teach structured water in cosmetic compositions, wherein the compositions comprise a biologically active agent. The structured water is defined as water that contains stabilized clusters of ions. The composition contains a combination of I and S water, though it is disclosed that just I water or just S water can be utilized in composition. It is disclosed that the composition can be used to enhance the activity of antibacterial agents. Exemplified is a method of topically applying the composition to the skin and a method of adding the clustered water to a cosmetic product, such as lipstick, foundation, blush, and others. See Col. 3, lines 43-Col. 4, line 26; Col. 1, line 19-Col. 2, line 66. The reference lacks a teaching of at least two antimicrobial agents within the cluster and silver ions.

Beerse et al. teach leave-on antimicrobial compositions which provide improved immediate germ reduction. Silver is taught as an active antimicrobial agent. See Col. 7, lines 54-67.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to teach the silver of Beerse et al. as the biologically active agent of Cioca et al. because Cioca et al. teach antibacterials as biologically active agents, whose activity can be enhanced when combined with structured water; thus, one of skill in the art would be motivated to combine the silver and structured water because of the expectation of achieving a topical cosmetic composition that is potent toward bacteria.

It is respectfully pointed out that a) silver must be within the cluster structure, as the electropositive charges of silver would interact with the electronegative charges within and without of the cluster structure; b) since a compound and its properties are inseparable (In re

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Papesch), adding the structured water of Cioca et al. to a cosmetic composition must have the property of preserving the cosmetic.

Claims 1, 3-5, 9, 11, 12, 19-20 and 22 are rejected under 35 U.S.C. 103(a) as being unpatentable over Cioca et al. in view of Stroud et al. (6,231,837).

Cioca et al. teach structured water in cosmetic compositions, wherein the compositions comprise a biologically active agent. The structured water is defined as water that contains stabilized clusters of ions. The composition contains a combination of I and S water, though it is disclosed that just I water or just S water can be utilized in composition. It is disclosed that the composition can be used to enhance the activity of antibacterial agents. Exemplified is a method of topically applying the composition to the skin and a method of adding the clustered water to a cosmetically active ingredient. See Col. 3, lines 43-Col. 4, line 26; Col. 1, line 19-Col. 2, line 66. The reference lacks a teaching of at least two antimicrobial agents within the cluster and potassium sorbate.

Stroud et al. teach cosmetic compositions. Potassium sorbate is disclosed as an antibacterial agent in cosmetic compositions. See Col. 18, lines 43-53.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to teach the potassium sorbate of Stroud et al. as the biologically active agent of Cioca et al. because Cioca et al. teach antibacterials as biologically active agents, whose activity can be enhanced when combined with structured water; thus, one of skill in the art would be motivated to combine the potassium sorbate and structured water because of the expectation of achieving a topical cosmetic composition that is potent toward bacteria.


***Conclusion***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Lauren Q Wells whose telephone number is (703) 305-1878. The examiner can normally be reached on M-F (7-5:30), with alternate Mondays off.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Sreeni Padmanabhan can be reached on (703)305-1877. The fax phone numbers for the organization where this application or proceeding is assigned are (703) 872-9306 for regular communications and (703) 872-9307 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-1234.

lqw  
January 21, 2003

  
SREENI PADMANABHAN  
PRIMARY EXAMINER

1/28/03